IN THE MATTER OF THE ARBITRATION **OPINION AND AWARD**

BETWEEN

International Union of Operating Engineers, Local 49 [Gerry Mattison]

BMS case No. 16-PA-0713

And

Pennington County, Minnesota

ARBITRATOR
Joseph L. Daly

APPEARANCES
On behalf of IUOE, Local 49
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On behalf of Pennington County, Minnesota
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JURISDICTION

Under the jurisdiction of the State of Minnesota Bureau of Mediation Services, the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on June 7, 2016, at the Pennington County Courthouse, Thief River Falls, Minnesota. Parties filed post-hearing briefs on July 12, 2016, received July 14, 2016. The decision was rendered on August 29, 2016.

ISSUES AT IMPASSE

IUOE states the issues:

1. Did the employer have just cause to terminate the grievant?
2. If not, what is the appropriate remedy?

Pennington County states the issue as:

Did Pennington County have just cause to terminate Gerry Mattison?

RELEVANT CONTRACTUAL PROVISIONS

SECTION 17
DISCIPLINE

A. Employees will be disciplined only for just cause. The Pennington County Personnel Policy lists occurrences that may be sufficient for cause of discipline.
B. Disciplinary action will be in the form of:
    1. 2 oral reprimands; or
    2. Written reprimand; or
    3. Suspension without pay for up to ten (10) working days; or
    4. Demotion; or
    5. Discharge.

Minor disciplinary matters will be handled in the order above. More severe problems may use more severe disciplinary actions at the employer's discretion and subject to the remaining sections of this provision.

RELEVANT PENNINGTON COUNTY EMPLOYEE PERSONNEL POLICY

C. Progressive Discipline

a. Progressive Discipline attempts to improve employee performance or conduct by assigning a disciplinary action appropriate for the offence. If, after the initial disciplinary action, employee performance has not improved, disciplinary action of greater severity is administered. Responsibility for initiating and administering disciplinary action lies with Supervisors, Dept. Heads, the Payroll/HR Manager, and the County Commissioners.

FINDINGS OF FACT

1. By letter dated November 25, 2015, Gerry Mattison, a Pennington County Highway Department Heavy Equipment Operator for over 20 years, was placed on leave pending discharge. The letter read in applicable part:

NOTICE OF INTENT TO DISCHARGE
PURSUANT TO MINNESOTA STATUTE

This letter is sent to advise you that the Board of Commissioners of Pennington County is proposing your immediate discharge as a highway equipment operator pursuant to Minnesota Statutes 197.46, a copy of which is attached. The grounds for such proposed discharge include but are not limited to:

1. Your poor attitude, poor judgment, insubordination, and poor communication style as they relate to the workplace
2. Employee misconduct

3. Failure to observe and willful violation of county policies

These matters give rise to the proper standard under Minnesota Statute 197.46. [County exhibit #34].

On the evening of November 24, 2015, the County Board of Commissioners met in closed meeting and upheld the termination of Mr. Mattison. [County exhibit #33].

The union on behalf of Mr. Mattison filed a grievance on November 27, 2015, stating that Section 17-Discipline and all other articles applicable in the contract had been violated. [County exhibit #35]

2. Mr. Mattison began working for Pennington County in 1995 and continued with full-time employment up until his termination on November 24, 2015. Prior to 2010, the county had language in its collective bargaining agreement with the IUOE that required purging of all disciplinary notices two years after issuance. In 2010, this language was bargained out of the agreement, and Mr. Mattison's disciplinary history could be tracked and documented.

Mr. Mattison's disciplinary history is extensive. In all, Mr. Mattison has had 11 separate disciplinary infractions in his file from 2010 to 2015 involving matters such as: retaliation against witnesses or confronting co-workers in a threatening manner and multiple instances of dishonesty, insubordination, and flat out refusal to follow reasonable workplace rules. Mr. Mattison has served 13.5 days of unpaid suspension between 2010 and 2015; received oral warnings and written warnings, worked through 120-day Performance Improvement Plan; and was assigned a 1-on-1 job coach to work on Mr. Mattison's attitude, anger, history of insubordination, and misconduct. "All of these progressive steps were undertaken in an effort to get [Mr.] Mattison to change his ways." [Post-hearing brief of county at 5].

At the hearing, Pennington County focused on Mr. Mattison's past disciplinary record. The union contends that "most of which included oral or written warnings between 2010 and 2014 for relatively minor issues such as sarcastic comments to supervisors, working beyond eight hours without authorization in order to finish a plow route, telling his supervisor 'how to do his job', talking to MNDOT employees during working hours, tardiness, driving a truck with a faulty alternator, and recording incorrect odometer readings." [Post-hearing brief of union at 4, citations omitted]. The union contended that "Mr. Mattison has previously received a 2-day suspension in 2010 for 'discourteous comments', a 3-day suspension in 2012 for so-called 'theft

of time' when he used the bathroom at his brother's carwash, and another 2-day suspension for discussing the 'time theft discipline' with his coworkers. And finally, the most serious discipline issued to Mr. Mattison was a 5-day suspension in February 2014, 'intentionally spreading untrue information' about a coworker who Mr. Mattison suspected had stolen some oil filters from the county." [Post-hearing brief of union at 4, citations omitted]. None of the above disciplines was grieved.

3. Upon Mr. Mattison's return to work from the 5-day suspension on March 10, 2014, the county placed Mr. Mattison on a Performance Improvement Plan (PIP) designed to correct "issues related to your attitude and communications file." [Employer exhibit 15, p. 1]. The PIP set forth a number of minimum performance expectations such as maintaining "team oriented communication," "refrain[ing] from bringing up the past when confronted with constructive criticism," and "put[ting] forth your best efforts toward performing your job duties." [Id. p.2] Mr. Mattison also met with workplace consultant, Dr. Susan Herreid, about "developing appropriate communication within the workplace." At the same time that the county provided Mr. Mattison with the PIP documents, the county also provided Mr. Mattison with a Personnel Performance Review document dated March 10, 2014, which indicated that Mr. Mattison "needs improvement" or "fails to meet expectations" in a number of areas such as "attitude," "cooperation," "judgment," "initiative." [Employer exhibit 16]. In response, Mr. Mattison noted in the "employee comments section" that "[i]f at any time you observe me not meeting expectations I request you provide to me in writing notification so I can be made aware and take corrective actions to meet and exceed expectations!" [Id. p. 4]

The PIP required Mr. Mattison to meet with the county every 30 days to review his progress. Mr. Mattison had a 30-day review, a 60-day review, a 90-day review, and a final 120-day review which occurred on August 5, 2014. None of these reviews took place on precisely 30, 60 or 90 day dates, but did occur within a reasonable time frame after those dates. On the final 120 day review, Mr. Michael Flaagan, the county engineer and overall supervisor of Mr. Mattison, wrote that "Gerry Mattison has achieved the required improvement outlined above." [Employer exhibit 22, p. 2].

On October 8, 2014, Mr. Mattison's direct supervisor, Terry Peterson, accused him of various acts of misconduct.

Mr. Peterson testified at the hearing that on October 8, 2015, he drove a truck out to the county gravel pit and discovered that someone had spun the tires of the county's front-end loader into the ground. Multiple employees had been working at the gravel pit that day. Mr. Peterson confronted Mr. Mattison back at the shop. Mr. Peterson "asked him why he had spun the loader into the pit." Another allegation was that Mr. Mattison disobeyed an order to cease driving his gravel truck on Highway 70. On August 20, 2015, Mr. Flaagan, the county engineer, received an email from a county resident who lives just north of the gravel pit on 130th Avenue N.W. (also referred to as County Highway 70) complaining about dust created by county gravel trucks. After receiving that email, Mr. Flaagan directed supervisor Terry Peterson to inform all the county drivers that they should stop driving on Highway 70. Mr. Peterson testified at the arbitration hearing that he subsequently gave that directive to three employees – Brian Badard, Conrad Holten, and Gerry Mattison. There is a dispute as to precisely what Mr. Peterson told the three employees. Mr. Peterson said he told Mr. Mattison to find a different route to use when hauling gravel. During the hearing Mr. Mattison and Mr. Holten both testified that they interpreted Mr. Peterson's directive as an order to avoid driving on 130th Avenue N.W. when hauling gravel, but otherwise they could use the road. [See post-hearing brief of union at 9]. Consequently Mr. Holten and Mr. Mattison continued to drive on 130th Avenue on various occasions throughout the remainder of August, September, and early October of 2015 when they were not hauling a load of gravel. Mr. Mattison testified at the arbitration hearing that Mr. Peterson did not inform the drivers that the complaint pertained specifically to "dust." Mr. Mattison testified he understood the complaint to be concerned about ruts in gravel roads caused by heavily loaded trucks-such complaints being much more common than dust complaints.

The issue came to light once again on October 16, 2015, when the same citizen emailed another complaint to Mr. Flaagan about the dust. At this point, Mr. Peterson testified, he was clear to the employees "absolutely do not use this road anymore." At the arbitration hearing Mr. Holten and Mr. Mattison both agreed that that is what Mr. Peterson told them on October 16, 2015.

Mr. Peterson also complained about Mr. Mattison negligently overloading a trailer with soil. On October 21, 2015, Mr. Peterson dropped Mr. Mattison off at the gravel road and instructed him to use the survey car's pickup truck and trailer to haul "a good load of black dirt back to the shop." Mr. Mattison has had his commercial driver's license (CDL) since 1983 and

has owned his own trucking and hauling company for the same period of time. He has worked as a heavy-duty equipment operator for Pennington County for 20 years, loading various pieces of equipment. Mr. Mattison was specifically trained on weight matters at the "Minnesota Truck Weight Education" program. Mr. Peterson testified that he told Mr. Mattison to go get a "decent amount" of top-soil for a project they were working on. When Mr. Mattison returned back to the shop he found Mr. Peterson and asked, "Is that enough dirt for you?" Mr. Peterson interpreted Mr. Mattison's remark as sarcasm. Mr. Mattison denied any such sarcasm; rather, Mr. Mattison testified, he simply asked Mr. Peterson if he had brought enough dirt. Mr. Peterson testified he was worried that the frame of the truck had been bent. Mr. Peterson testified he could tell immediately that it had been overloaded because the rear tires appeared deflated and the hitch was only a few inches off the ground. Mr. Peterson testified he was concerned that the truck and trailer had been damaged by the weight of the soil. He was also concerned that the frame of the truck might have been bent. Further, he testified he was concerned that Mr. Mattison may have put the public in danger by hauling such an overloaded trailer from the gravel pit. Mr. Mattison got in the truck and drove it to the weigh station to find out the weight. Upon weighing the trailer, Mr. Peterson discovered that the total weight of the soil was 19,100 pounds, which is 9,240 pounds more than the trailer's weight limit of 9,860 pounds.

The trailer used by Mr. Mattison had never been used by him before. He had not received training or instruction on the use of this specific kind of trailer. Further, Mr. Mattison pointed out that he almost never hauls soil and is not familiar with soil weights.

3. On October 22, 2015, County Engineer Michael Flaagan drafted a letter to County Attorney Alan Rogalla requesting that he conduct an investigation of the spin of the loader tires, the driving across the road, and the overloaded trailer. Mr. Rogalla has conducted employee/employer investigations for the county in the past. He acts as an investigator and does not participate in disciplinary decisions or recommendations. Mr. Rogalla analyzed 10 discrete accusations raised against Mr. Mattison. On November 5, 2015, Mr. Rogalla issued his final report to the county, in which he dismissed as meritless all but three accusations.

<u>Digging Loader into Gravel Pit</u>

1. Negligence – Not sustained.
2. Discourteous – Not sustained.
3. Insubordination – Not sustained

<u>130 Avenue NW Issue</u>

4. Insubordination – Sustained
5. Discourteous to the Public – Sustained

Overloaded Trailer

6. Negligence – Sustained
7. Discourteous to Supervisor – Not Sustained

Cell Phone Use When Driving County Trucks

8. Not Sustained

Uneven Spreading of Gravel

9. Discourteous conduct – Not Sustained
10. Negligence – Not Sustained

(Investigation Report, pp. 11-15.) [County exhibit 25 – *Investigative Report*]

The three sustained allegations found by Mr. Rogalla are insubordination (i.e. driving on 130th NW); discourteous to the public (i.e. driving on 130th NW); and negligence (i.e. overloading of the trailer). Based on Mr. Rogalla's findings, Mr. Mattison was terminated on November 25, 2015.

4. The county contends that Mr. Mattison's 11 separate disciplinary actions in his file from 2010 to 2015 involve some very serious matters. They add up to a clear pattern of refusal to follow rules and to be "managed."

County Attorney Alan Rogalla testified he frequently is asked to conduct workplace investigations for the county. He simply acts as a neutral fact gatherer for the county board of commissioners and the department heads. During the course of his interviewing witnesses, two witnesses brought up additional concerns related to Mr. Mattison that Mr. Rogalla felt he needed to look at. These allegations involved the concern that Mr. Mattison was using his cell phone while operating county equipment and that Mr. Mattson had unevenly spread gravel on a road near property owned by a person that Mr. Mattison had a personal family dispute with. The allegation regarding cell phone usage was not substantiated by Mr. Rogalla since he determined that county policy actually did allow the use of some cell phones while operating county equipment. He also determined that uneven spreading of gravel was not substantiated because Mr. Mattison's union stewards' stated that the truck Mr. Mattison was operating at the time had a "design flaw" that caused the uneven spreading. Mr. Rogalla also did not substantiate the spinning of tires in the gravel pit when he discovered in his interviews that another employee had

done so. That employee admitted to engaging in the behavior out of frustration with Mr. Mattison and how Mr. Mattison would continually leave the gravel pit a mess and that that employee would have to clean it up afterwards. That employee described Mr. Mattison as a "bad apple" that should have been fired "years ago."

Regarding Mr. Rogalla's file substantiating the driving on 130th Avenue NW August 20, 2015, Mr. Mattison first told Mr. Rogalla that he was told to "avoid" using the road. Later Mr. Mattison told Mr. Rogalla that he was "never" told not to use the road. Later he told Mr. Rogalla he "could not remember all of what was said to him" and "somehow remembered something to the effect that he should not go down the road with loads, but he could use the road when he was not carrying a load." [See county exhibit 25, pp.40-41]

Mr. Conrad Holten, who was also interviewed by Mr. Rogalla, told Mr. Rogalla that he remembered "being told to 'avoid' using 130 Avenue NW" in August 2015. Mr. Holten testified at the arbitration hearing that Mr. Peterson did not clearly tell employees to stay "completely" off 130th Avenue NW until later October 16. Both Mr. Holten and Mr. Mattison continued to use 130th Avenue NW. Mr. Peterson told Mr. Rogalla he could not remember his exact words but that he indicated that all employees knew they were not to use 130th NW road.

On October 16, 2015, Mr. Flaagan received the second dust complaint from the same citizen. This second complaint prompted Mr. Flaagan to pull the GPS information from each of the gravel trucks utilized by the county to see who was using 130th Avenue NW. He found that Mr. Mattison had traveled on 130th Avenue NW with his gravel truck nearly 70 times between August 24, 2015 and October 16, 2015. At this point, on October 16, 2015, Mr. Peterson testified he made it crystal clear and told all the truck driver employees "absolutely do not use this road anymore." Mr. Holten and Mr. Mattison agree with that testimony. Mr. Mattison no longer used that road after October 16, 2015. Mr. Flaagan issued an oral reprimand to Mr. Holten for traveling on the road on seven occasions. Since Mr. Holten has a clean disciplinary history, Mr. Flaagan felt an oral warning was appropriate in light of his lack of progressive discipline.

The county contends that due to Mr. Mattison's disciplinary history which shows a pattern of defiance towards supervisors; because traveling on the road became a game to Mr. Mattison; and because of the dangerous overloading of the truck and trailer, the county had just cause to terminate Mr. Mattison. "It is hard to imagine an employee situation with more notice

of the consequences of insubordination and continued refusal to follow supervisory directives." [Post hearing brief of county at 21].

The county contends that just cause exists in this case because it was "the last straw". In "last straw" discharges, the employee engages in some misconduct that would not, by itself, be just cause for discharge. However, based on accumulation of offences, the employer decides in this case that termination is appropriate. "Arbitrators will uphold last-straw discharges when the employer has sufficient evidence to show that an employee's pattern of unsatisfactory conduct warrants discharge." [*ISD No. 282 and Service Employees International Union,* quoting *Discipline and Discharge in Arbitration,* 70 (Norman Brand, ed. 1999].

Basically the county felt it had no further recourse and that any additional attempts would be futile. "As stated by Commissioner Don Jensen at [the] arbitration, after serving on the Highway Department Committee for 20 years, he had personally reached the 'end of the line' and the last two instances with [Mr.] Mattison were just 'too much.'" [Id. at 23-24]. This workplace is finally healing. The county has just cause to terminate the employment of Gerry Mattison.

5. International Union of Operating Engineers contends that the employer lacked just cause for termination. While the shear number of accusations made against Mr. Mattison before and during the investigation generated a complex factual landscape, Mr. Rogalla's dismissal of most of the accusations as meritless simplifies the analysis of this case. Only three allegations were substantiated: (1) insubordination for driving on 130th Avenue NW; (2) discourteous to the public; and (3) negligence in overloading the trailer with soil on October 21, 2015.

The Union contends that Mr. Peterson did not provide Mr. Mattison with a clear directive to completely cease driving on 130th Avenue NW in August 2015. Mr. Peterson admittedly instructed his employees to avoid 130th Avenue NW "when hauling gravel". Mr. Peterson did not tell his employees to stay "completely" off 130th Avenue until October 16. [See Investigative Report pp. 26]. The employer bears the burden of demonstrating that the order was both specific and understandable. Mr. Mattison has claimed throughout this entire matter that Mr. Peterson did not tell the drivers to stay "completely" off 130th Avenue NW until October 16. Mr. Mattison, as well as Mr. Holten, has stated on multiple occasions that Mr. Peterson stated only that drivers avoid using 130th Avenue "as a haul road". Instructing a driver to cease using a particular road "while hauling gravel" and cease using the road "completely" are two different

directives. Mr. Mattison explained that while he did continue to use 130th Avenue NW, he typically only utilized that road in the morning when his truck was empty or at other times when he was not hauling any gravel. Only later in October 2015, after a second complaint was received, did Mr. Peterson specifically tell his drivers to stay "completely" off the road. Prior to October 16, 2015 there was no clear directive to do so. Mr. Peterson acknowledged on direct examination that he instructed Mr. Mattison to "avoid" using 130th Avenue NW "as a haul road". Mr. Peterson testified on direct that what that meant was "stay off it is what I meant." The employer cannot satisfy its burden of proving that Mr. Peterson ordered Mr. Mattison to stay "completely" off 130th Avenue NW, and there is no reliable evidence that Mr. Mattison ever drove on the prohibited road with a fully-loaded truck. The employer's allegation of insubordination and discourteous to the public therefore fail.

Further, argues the union, Mr. Mattison did not negligently overload the truck with soil on October 21, 2015. The evidence does not support a finding that Mr. Mattison is guilty of negligently overloading the trailer with soil. Mr. Mattison did not knowingly or negligently overload the trailer. The county cannot satisfy its burden of proving negligence in overloading the trailer. Mr. Mattison has never been instructed to avoid overloading trailers when hauling materials. The county never informed Mr. Mattison that he could be disciplined or terminated for overloading a trailer. He has never been trained on soil weights and almost never hauls soil as a county employee. Further, he has never used this particular trailer before and was never trained on its weight capacity. The only vague instruction he received from Mr. Peterson was to bring "a good load" of soil back to the shop. It is undisputed that there was no damage to the truck or the trailer.

Mr. Rogalla's logic seems to be that Mr. Mattison knew or should have known that he overloaded the trailer on October 21, 2015, because he was experienced driving other types of trucks. That logic is flawed contends the union. The fact that Mr. Mattison is an experienced truck driver with a CDL license says nothing about his knowledge or experience driving the kind of pickup truck and trailer at issue in this case. Mr. Mattison had never used or been trained on using that particular truck and trailer. It makes no sense to say that Mr. Mattison should have known how to properly load the trailer with "a good load" of soil because he has experience using much larger and different trucks to haul gravel. Specialization within a general field does not logically imply other specializations within that field. Boiled down, this case is a case where

the county unfairly fired Mr. Mattison for the simple fact that the trailer was inadvertently overfilled. Neither the truck nor the trailer sustained any damage. Further, Mr. Peterson, himself, knowingly drove the truck and the overloaded trailer to the weigh station and then back to the shop. Mr. Peterson himself was never disciplined for doing so.

The county failed to conduct a fair investigation says the union. Mr. Mattison has claimed throughout this ordeal that he felt targeted by management and his coworkers, who seemed to be on a "witch hunt" against him. Whether or not this was a "witch hunt" the evidence conclusively demonstrates that Mr. Mattison was not treated fairly. He was falsely accused of spinning his tires. He was assigned to use a truck and trailer with improper brakes. He was accused of violating the state and federal law by using his cellphone while driving. It was later determined he had broken no law. Mr. Mattison was harshly criticized for his efforts to defend himself. While Mr. Rogalla may not have harbored conscious bias against Mr. Mattison in his investigation, the evidence of bias in Mr. Rogalla's report is undeniable. The union argues that while Mr. Rogalla surely meant well in conducting his investigation, there is nevertheless clear evidence of bias in his investigation.

Termination is not warranted in light of all the relevant circumstances. Throughout this matter, the county has focused its attention on the fact that Mr. Mattison has a history of prior discipline. The union does not dispute Mr. Mattison's record. Yet the bare fact of prior discipline cannot establish just cause, and cannot make up for factual deficiencies in the employer's case. In fact, Mr. Mattison's prior record of discipline (most of which occurred a year or more before his termination), along with his more recent and successful performance efforts, undercuts the employer's case. Before he was terminated in November 2015, Mr. Mattison had successfullycompleted a 120-day Performance Improvement Plan, he had attended sessions with a workplace counselor, and he had been performing his job well for a substantial amount of time. Mr. Mattison was not terminated for any provable misconduct; rather he was fired because of his perceived reputation. At the hearing, Mr. Flaagan referred to Mr. Mattison as a "cancer." Throughout this matter the county has simply tried to build a case against Mr. Mattison. The objective evidence is insufficient to demonstrate wrongdoing on Mr. Mattison's part.

Based on the above analysis, the International Union of Operating Engineers, Local 49, requests that the arbitrator to sustain the grievance, order the employer to provide the grievant

with immediate reinstatement, full back pay and benefits, and any other appropriate make whole relief.

DECISION AND RATIONALE

The key question in this case is: has the county proven by a preponderance of the evidence just cause to terminate Gerry Mattison.

Mr. Mattison, a 20-year employee of the county, has been a thorn in the side of management for a number of years. His record of 11 separate disciplinary infractions from 2010 to 2015 involves some serious matters. Included are retaliation against witnesses, confronting coworkers in a threatening manner, instances of dishonesty, insubordination, and refusal to follow workplace rules. Mr. Mattison has already served 13.5 days of unpaid suspensions between 2010 and 2015. He has received oral warnings, written warnings, worked through 120-day Performance Improvement Plan, and was assigned a one-on-one job coach to deal with his attitude, anger, insubordination, and misconduct. The county took progressive steps over the years in an effort to get Mr. Mattison to change his ways. All of these disciplines were upheld. Consequently, this arbitrator will not analyze whether the previous disciplines were proper or improper. They are on his record of discipline. Then came the late August 2015 to November 2015. A number of further allegations were laid against Mr. Mattison. Among some of these were spinning tires of a front-end loader into the ground, disobeying an order to cease driving his gravel truck on 130th Avenue NW, and overloading a trailer with soil to the point of causing potential damage to the trailer and causing a safety hazard. These allegations and others caused County Engineer Michael Flaagan to draft a letter to County Attorney Alan Rogalla requesting that Mr. Rogalla conduct an investigation. Mr. Mattison was placed on administrative leave effective October 23, 2015. Mr. Rogalla conducted a number of investigatory interviews over several days.

Ultimately Mr. Rogalla looked at ten separate possible allegations involving potential discipline and found that spinning the loader tires into the gravel pit was done by someone else. He found that cell phone use while driving a county truck was permissible therefore the allegation was not sustained. He found that uneven spreading of gravel was not sustained. His investigation led him to look more carefully at the insubordination and discourteous to the public allegations because Mr. Mattison drove his gravel truck on 130th Avenue NW in violation of

direct orders not to do so. He sustained those allegations of insubordination and discourteous to the public. Mr. Rogalla also focused on the overloaded trailer. He sustained Mr. Mattison's negligence in doing so, but did not sustain that Mr. Mattison was discourteous to his supervisor for doing so.

Consequently, Mr. Mattison was terminated.

This arbitrator must determine if the county showed by a preponderance of the evidence that insubordination and discourteous to the public for driving on 130th Avenue NW was proven, and negligence in overloading the trailer with soil on October 21, 2015 was also proven. Because of Mr. Mattison's substantial past disciplinary record from 2010-2014, if any of these allegations has been proven by the county, termination is proper.

Was there a clear directive to Mr. Mattison in August 2015 to cease driving on 130th Avenue NW? An analysis of the GPS records of Mr. Mattison's truck shows that he drove 70 times on 130th Avenue NW after the August warning by Mr. Peterson. So it is clear from the evidence that Mr. Mattison drove his truck on 130th Avenue NW after Mr. Peterson's August 2015 warning. The problem here is not that Mr. Mattison was not warned. The problem here is what precisely was the warning. Mr. Peterson testified at the arbitration hearing that he instructed his drivers "to avoid it as a haul road." Mr. Peterson told Mr. Rogalla during his investigation that "he told Mr. Mattison to find a different route to use when hauling gravel." Mr. Peterson interpreted that warning to mean his truck drivers were not to drive down 130th Avenue NW.

On the other hand, Mr. Mattison and Mr. Holten interpreted those words to mean that "he should not go down the road with loads, but he could use the road when he was not carrying a load." [Rogalla Investigation Report p. 41] The union contends that Mr. Peterson's choice of words confused his truck drivers. Some understood that they were not to use 130th Avenue NW at all. But Mr. Mattison and Mr. Holten both testified they interpreted Mr. Peterson's directive as an order to avoid driving on 130th Avenue NW when hauling gravel, but otherwise they could use the road. After the second complaint about dust was received, Mr. Peterson on October 16, 2015 then gave a very clear directive to stay completely off 130th Avenue NW. Based on the testimony of Mr. Peterson, Mr. Holten, and Mr. Mattison it is clear that the instructions given were not specific and clear. Insubordination and discourteous to the public cannot be proven unless there are specific and clear directives to the employee. Mr. Mattison could well have

understood that the citizen's complaint initially involved ruts in the road and therefore he should not drive his truck fully loaded down the road because of potential of causing ruts. He was not told that the complaint by the citizen involved a significant dust problem. Only on October 16, 2015, did Mr. Peterson make his directive specific and clear that the drivers should stay completely off the road. Therefore, the county has not proven by a preponderance of the evidence that Mr. Mattison was insubordinate or discourteous to the public. The employer bears the burden of demonstrating that the order was specific, clear and understandable. See Brand and Biren, *Discharge and Discipline in Arbitration* 5-5 (3rd ed. 2015). The employer has not satisfied this burden.

Has the employer proven negligence by Mr. Mattison for overloading the trailer? The evidence shows that Mr. Mattison is an experienced truck driver with a CDL license. Mr. Mattison had never driven that truck or trailer. He was not familiar with soil weight. On the other hand, it was clear by markings on the trailer than the weight limit for the trailer is 9,860 pounds. While Mr. Peterson told Mr. Mattison to go get a "decent amount" of top soil for the project they were working on, Mr. Mattison returned with a trailer approximately 9,240 pounds over the trailer's weight limit. In other words, the trailer was approximately 4.62 tons overloaded with soil. When Mr. Mattison returned to the shop with the overloaded trailer, he said to Mr. Peterson "That enough dirt for you then?" Mr. Peterson interpreted this as a sarcastic tone. Mr. Peterson told Mr. Mattison that the overloaded trailer was "not a good deal" and that it was "not a joke." [County exhibit 25, p. 25]. Mr. Mattison testified he was simply asking Mr. Peterson if he had brought enough dirt.

Photographs of the fully loaded trailer appear to show that the rear tires were fairly deflated and that the hitch was only a few inches off the ground. Mr. Peterson was concerned that the truck and trailer had been damaged by the weight of the soil. He was also worried that the frame of the truck had been bent. He was concerned that Mr. Mattison had put the public in danger by hauling such an overloaded trailer from the gravel pit. Mr. Peterson decided to slowly drive the truck to where he could weigh the truck.

Despite knowing the trailer was overloaded Mr. Peterson drove the overloaded trailer and truck to the weighing station in order to determine just how much the truck was overloaded. Perhaps Mr. Peterson should not have done so. But it is clear from the evidence that Mr. Mattison had so overloaded the trailer that it was in danger of being damaged and that the public was in danger

by hauling such an overloaded trailer from the gravel pit. Mr. Mattison's comments "Is that enough dirt for you?" was properly interpreted by Mr. Peterson as sarcasm. Mr. Mattison, while never having driven such a trailer, has 20 years of experience working for the county and owns his own company. He has sufficient experience and knowledge to know a trailer should not be dangerously overloaded. There is a sign on the trailer which says in part: "Warning", "Net payload 9,860 LB." Mr. Mattison knew or should have known that the truck was dangerously overloaded. Mr. Mattison was specifically trained on the "Minnesota Truck Weight Education" Program. His denial of knowing that the trailer was overloaded by nearly five tons of soil is not credible.

Mr. Peterson probably should not have driven the truck to the weigh station. He acknowledged that he did not receive discipline for intentionally hauling the overloaded trailer of soil across town to the weigh station and back. Mr Peterson did testify he drove very slowly. Nevertheless, this is not an arbitration about Mr. Peterson. It is an arbitration about Mr. Mattison's termination because of the employer's decision that this was the "last straw". The concept of just cause allows termination of an employee for the final step in the progressive discipline process, i.e. "the last straw." See *ISD No. 282 and Service Employees International Union,* BMS Case No. 12-PA-0137 (June 7, 2012) (Kircher, Arbitrator). Arbitrator Kircher addressed the concept of the "last-straw" discharge at length. She discussed the fact that when an employee in some misconduct that would not, by itself, be just cause for discharge, based on the accumulation of offenses, an employer's decision to terminate is appropriate. This employer had given Mr. Mattison a number of chances in its attempt to progressively discipline him. The decision to terminate reflects the employer's conclusion that past efforts at rehabilitation have failed and there was not a reasonable alternative to discharge. "Arbitrators will uphold last-straw discharges when the employer has sufficient evidence to show that an employee's pattern of unsatisfactory conduct warrants discharge." *Discipline and Discharge in Arbitration* at 70. The overloading of the trailer is not a minor infraction. Public safety and property were put in jeopardy. His sarcastic remark to Mr. Peterson cements his intention to overload the trailer. As stated by Commissioner Don Jensen at the arbitration, after serving on the Highway Department Committee for 20 years, he had personally reached the "end of the line". This was just "too much." While the insubordination and discourteous to the public claims for driving on 130th Avenue NW were not proven by a preponderance of the evidence, the overloading of the trailer

has been proven by a preponderance of the evidence. Consequently, just cause is established for Mr. Mattison's negligence. In fact, his action of overloading the trailer approaches gross negligence. Mr. Mattison knew or should have known, despite his protestations of lack of knowledge of weight of soil and never having driven the truck and trailer, that the trailer was dangerously overloaded. His experience and his training shows he knew or should have known that the trailer was dangerously overloaded. Based on his previous disciplinary history, this was the "last-straw" for the employer. As stated above, this was not a minor infraction. This was serious.

The grievance is denied. Just cause has been proven by a preponderance of the evidence by the employer to justify the termination of Mr. Mattison.

August 29, 2016

Date

Joseph L. Daly
Arbitrator